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No. 79-972

In the Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF PETITIONERS GEORGIA-PACIFIC CORPORATION AND PACKAGING CORPORATION OF AMERICA TO MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

Response of Petitioners Georgia-Pacific Corporation and Packaging Corporation of America to Motion of Certain Respondents to Dismiss the Writ of Certiorari

Petitioners Georgia-Pacific Corporation ("Georgia-Pacific") and Packaging Corporation of America ("PCA") submit this response to the Motion of Certain Respondents to Dismiss the Writ of Certiorari, dated September 24, 1980 ("Motion"), and respectfully submit that that motion should be denied.

GROUNDS FOR DENIAL OF THE MOTION

The motion to dismiss the writ of certiorari is premised upon the sole fact that petitioners entered into settlement agreements with class action plaintiffs in this multidistrict

antitrust litigation ("M.D.L. 310") after the petition for writ of certiorari was filed with this Court.[1] Based upon this fact alone, the moving respondents ("movants") argue that the matter before this Court is moot and, simply by giving their mootness argument another name, that the writ of certiorari should be dismissed as improvidently granted in light of "changed circumstances." Movants, however, not only have mischaracterized the current status of this litigation but also have misstated the effect of petitioners' settlement agreements on this proceeding. As set forth in this response, the changes in circumstances in this litigation since the petition was filed have neither rendered the issue before this Court moot nor provided any reasons why the writ should be dismissed as improvidently granted; if anything, developments since the petition was filed confirm the need for the Court to review the decision of the Court of Appeals for the Fifth Circuit in this case.

I. Controversy Exists Between Petitioners and Respondents on the Issue Before the Court

The issue before the Court in this proceeding is whether defendants in antitrust cases may assert rights of contribution. *See* Petition for a Writ of Certiorari to the United States

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[1]Georgia-Pacific's and PCA's settlements were discussed in petitioners' opening merits briefs filed with this Court. Brief for Petitioner Georgia-Pacific Corporation ("Georgia-Pacific Br.") at 1-2, 7-11; Brief for Petitioner Packaging Corporation of America ("PCA Br.") at 3-5; Brief for Petitioner Westvaco Corporation ("Westvaco Br.") at 8-9. Westvaco Corporation ("Westvaco") entered into a settlement agreement with the class action plaintiffs after those briefs were filed as a consequence of the absence of an established right of contribution. *See* Motion to Dismiss By Westvaco Corporation ("Westvaco Motion"), filed with this Court on September 25, 1980. Westvaco's settlement agreement, unlike Georgia-Pacific's and PCA's, requires it to seek dismissal of its appeal in this proceeding. *See id.* at 2. (Copies of Georgia-Pacific's settlement agreement with the class action plaintiffs have been lodged with this Court. Copies of PCA's settlement agreement, the Pretrial Orders cited in notes 5 and 8 and the Court of Appeals brief cited in note 10 of this brief also are being provided to the Court.)

Court of Appeals for the Fifth Circuit ("Petition") at 2. As Georgia-Pacific unequivocally urged in its opening brief on the merits, this Court should require the Courts below to "apply contribution rights among defendants in all cases pending as part of M.D.L. 310." Georgia-Pacific Br. at 27. *See also* PCA Br. at 8. The Court's resolution of this issue is important not only to the future proceedings in M.D.L. 310 but also to the private enforcement of the antitrust laws generally.

In an effort to avoid having this Court address this issue, movants, before addressing the merits themselves,[2] have asserted that there is unanimity among petitioners and respondents on this issue and that the writ therefore should be dismissed. Movants thus state their conclusion that "not only has each of the three petitioners settled, but in addition none of the petitioners takes the position that settling defendants should be liable for contribution." Motion at 3. This statement, however, is neither a fair or complete account of the status of this litigation nor an accurate description of the issue or petitioners' argument before this Court or the Courts below.

A. The Contribution Issue Remains in M.D.L. 310

Contrary to movants' suggestion, petitioners' tentative settlements of the class action cases have not eliminated them as defendants in M.D.L. 310 or removed the risk of a judgment or judgments being entered against them after trial.[3] Movants virtually ignore a significant portion of

[2]Movants have requested and obtained an extension of time for filing of respondents' briefs on the merits in order to have the Court act upon their motion to dismiss before such briefing is required. On September 26, 1980, three additional defendant-respondents joined in the motion to dismiss by a separate paper that set forth no additional grounds for the motion.

[3]Georgia-Pacific and PCA have always believed this risk was remote in light of their firm belief in their innocence. In fact, Georgia-Pacific's innocence of the allegations against it in this litigation was confirmed again by the jury's recent verdict in the class action trial against The Mead

(continued)

M.D.L. 310 that has not been concluded, even tentatively, by settlement. Petitioners have been named as defendants in several cases, consolidated as part of M.D.L. 310, filed on behalf of plaintiffs who opted out of the M.D.L. 310 plaintiff class.[4] Georgia-Pacific's motion in the District Court to amend its answers to assert contribution rights by cross-claim and affirmative defense was filed not only in the M.D.L. 310 class action cases, but, as the motion makes clear, in "[a]ll actions [in M.D.L. 310] in which Georgia-Pacific Corporation has been named and served as a defendant." (J.A. 231.) Unquestionably, therefore, Georgia-Pacific's motion to amend was not, as movants imply, confined to the class action cases. Nor was the District Court's order denying petitioners' motions so limited, as the order expressly stated that it related to "all cases" in M.D.L. 310. (J.A. 250.) Hence, Georgia-Pacific's express request for leave of court to assert contribution claims and defenses in the opt-out cases pending at the time of the District Court's order was part of the matter upon which the District Court ruled. Moreover,

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Corporation ("Mead"). In that verdict, the jury found Mead liable, but Georgia-Pacific was specifically found by the jury not to have participated in the alleged conspiracy. Nevertheless, the risk, even though remote, of an adverse judgment based on sales of an entire or a substantial part of the industry remains for Georgia-Pacific and PCA in M.D.L. 310. The jury's verdict against Mead, a company that was acquitted of essentially the same charges in the trial of the companion criminal litigation, demonstrates the reality of such a risk and the inordinate pressure on defendants to settle treble damage litigation at exorbitant amounts in order to avoid that risk. As Georgia-Pacific stated in its opening brief, it is especially unfair to impose such a risk upon innocent companies, as Georgia-Pacific and PCA believe they are, that nevertheless find themselves embroiled in treble damage litigation and thereby deprive such companies of the opportunity to prove their innocence. *See also* Westvaco Motion at 1; pp. 16, 22 *infra*.

[4] *See* Georgia-Pacific Br. at 3 & n.6. These opt-out cases have been filed by substantial purchasers of corrugated containers and sheets whose purchases during the claimed damage period amount to hundreds of millions of dollars.

Georgia-Pacific has pleaded contribution cross-claims and defenses in its answers to the complaints in opt-out cases filed after the District Court's denial of its motion to amend and Georgia-Pacific and PCA intend to prosecute such claims and defenses in the opt-out cases in the event this Court, as Georgia-Pacific and PCA firmly believe it should, reverses the decision of the Court of Appeals for the Fifth Circuit.

Movants concede that Georgia-Pacific's cross-claims can "be read as encompassing" the opt-out cases in M.D.L. 310, but seek to overcome the significance of that fact by characterizing petitioners' arguments on the merits of the contribution issue as confined to class action cases and by claiming that the cross-claims sought to be asserted were only against "settling defendants" when, at the time of the District Court's order, no defendant had settled an opt-out case. Motion at 9-10 n.9. As with movants' other efforts to recolor petitioners' contentions to suit movants' ardent desire to avoid a decision on the merits of the contribution issue by this Court (*see* pp.9-13 *infra*), movants thus have focused on part, but not the whole, of petitioners' claims.

Undeniably, the class action portion of M.D.L. 310, as well as other recent antitrust class actions, stands as stark illustration of the unfairness and injustice of a denial of contribution rights in antitrust treble damage litigation and one of the kinds of abuse that will result where rights of contribution are denied. Petitioners naturally have emphasized the clear record of abuse that abounded in the M.D.L. 310 class actions, which unequivocally demonstrates the compelling need for recognition of contribution rights in antitrust cases. That is by no means to say, however, that similar abuse will not occur in the opt-out cases, the proceed-

ings in which are in large part just now getting under way.[5] Petitioners do not contend, and have never suggested, that contribution is only appropriate in class action cases, but rather have merely observed that the extreme settlement coercion resulting from the nation-wide, industry-wide damage exposure prevalent in such cases dramatically illustrates the unfairness of a denial of contribution rights. *See, e.g.*, Georgia-Pacific Br. at 5-6; Westvaco Br. at 31-34. As petitioners have pointed out, other recent non-class-action, treble damage litigation equally demonstrates the unfair and unjust consequences of a denial of contribution rights (*see* Georgia-Pacific Br. at 19-21; Westvaco Br. at 22-24) and

[5]Movants' assertion that "the record is virtually non-existent in the opt-out cases and [that] they played no role in petitioners' arguments below or the decisions below" (Motion at 10 n.9) is misleading. The time for class members initially to opt out of the M.D.L. 310 plaintiff class did not expire until October 1979, several months after the contribution issue was addressed by the District Court and while the matter was *sub judice* before the Court of Appeals. Although some separate lawsuits had been filed before that time by plaintiffs who ultimately opted out of the class, many of the opt-out cases were not filed or transferred to M.D.L. 310 until only a few months ago. A separate "track" for pretrial proceedings has been established for all opt-out cases, pursuant to which discovery is just now beginning. Thus, although opt-out cases were, as set forth above, included in the District Court's denial of petitioners' motions to amend their answers, the nascent nature of these cases at the time of the District Court's and Court of Appeals' orders explains the absence of a "record" on the consequences of a denial of contribution rights in these cases. *Indeed, it is ironic for movants to suggest that the current absence in the opt-out cases of a record of settlement coercion as in the class actions justifies dismissal of the writ while at the same time asserting that the settlements resulting from such coercion in the class cases render the contribution issue moot.* Moreover, any question regarding the District Court's approach to contribution in the opt-out cases was laid to rest when, approximately seven months after denial of petitioners' motions to amend, the District Court dismissed (without entry of judgment) contribution claims that had been filed in M.D.L. 310 after petitioners' motions were denied. As the District Court stated: "In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, ... [a]ll ... contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice." Pretrial Order No. 31, ¶ 3 (December 21, 1979).

there is no reason to believe this pattern will change in the opt-out cases in M.D.L. 310.

Moreover, movants' talismanic exhortation that Georgia-Pacific's motion sought to assert cross-claims only against "settling defendants" ignores the fact that that term was defined in the motion to include not only defendants that had already settled but also those that might "[t]hereafter" settle, as many did in the class actions and, in fact, as some have now done in the opt-out cases. (J.A. 233.)[6] Additionally, Georgia-Pacific expressly reserved the right in its motion to amend to assert contribution claims against others not included in the definition of "settling defendant" in that motion, "including defendants other than settling defendants." (J.A. 232-33.) The District Court's order and opinion denying petitioners' motions, however, unequivocally answered in the negative "[t]he question presented by these motions. . . whether, in an antitrust action such as this, contribution among defendants is proper." (J.A. 259.) The Court of Appeals' ruling on this issue was no less clear. (J.A. 278 ("The question of the right of contribution under the federal antitrust laws has been answered by another panel of our court .... It was held that there is no such right.")) Accord-

[6]Georgia-Pacific and PCA are aware of at least two defendants—both of which have joined in the motion to dismiss the writ—who reportedly have entered into settlements with M.D.L. 310 opt-out plaintiffs. Movants' assertion that "at the time of the dismissal of Georgia-Pacific's cross-claims in May 1979, no defendant had settled any non-class action case" (Motion at 10 n.9), thus is inconsequential. In fact, movants' attempt to redefine the term "settling defendant" from the clear meaning given to that term in Georgia-Pacific's motion to amend is an obvious afterthought that does not reflect their true perception of that term. For example, in a memorandum filed in the District Court by several of the defendant-respondents (including ten who have now moved to dismiss the writ of certiorari) opposing Westvaco's motion to amend its answers to assert contribution claims, the proposed claims were recognized to be "against all present *and future* settlors ...." Memorandum of Certain Settling Defendants in Support of Dismissal of Westvaco Corporation's Cross-Claim for Contribution With Prejudice at 1 (dated April 2, 1979) (emphasis supplied) (R. 254).

ingly, the focus of Georgia-Pacific's motion, and the extensive appellate proceedings that have followed and have brought petitioners to this Court, clearly is not as narrow as movants contend.[7]

Moreover, petitioners' settlement agreements with the class action plaintiffs in M.D.L. 310 are tentative at this time: despite movants' repeated conclusory statements that petitioners have "settled" and are now "settling defendants" (*see* Motion *passim*), petitioners' settlements are not to become final until the occurrence of some contingencies specified in

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[7]Not only is movants' suggestion that there was no party in the opt-out cases against which Georgia-Pacific sought to assert contribution claims factually erroneous, but their formalistic approach to this matter also disregards the procedural context in which these appellate proceedings arose and in which, until now, respondents have sought to expedite appellate proceedings on this issue. Thus, although petitioners' motions raising the contribution issue in the District Court were motions for leave of court to amend their answers to assert contribution claims and defenses, the District Court, as initially requested by certain defendant-respondents (including ten defendants who have now moved to dismiss the writ granted by this Court), denied the claims sought to be asserted so that the contribution issue could be raised immediately on appeal pursuant to entry of a Rule 54(b) final judgment. (J.A. 250-51.) These defendant-respondents requested that the District Court deny Westvaco's request that the Court delay ruling on the contribution issue until decisions were rendered on that issue in appeals then pending in the Fifth and other Circuits (J.A. 80), arguing for a prompt entry of judgment on the contribution issue (*including claim reduction*) so that prompt appellate resolution could be sought in M.D.L. 310. Memorandum of Certain Settling Defendants in Support of Dismissal of Westvaco Corporation's Cross-Claim for Contribution With Prejudice at 2-4 (dated April 2, 1979) (R. 255-57). Defendant-respondents likewise successfully moved in the Court of Appeals for expedited treatment of petitioners' appeals. Movants, who at first advocated prompt final appellate resolution of the issue, now, after more than one year of extensive appellate proceedings, ask this Court to require petitioners to start this process anew in order to raise the very same issue and to assert the very same argument now before this Court.

the agreements, none of which has yet taken place.[8] Georgia-Pacific and PCA fully believe that the plaintiff class can have no objection to the substantial settlements extracted from them and that their respective settlements ultimately will be finally approved; nevertheless, the fact remains that these settlements have not yet been finalized and may not be for a substantial period of time. Until they are, petitioners still bear the risk of possible adverse judgments in the class action cases in M.D.L. 310, and seek, as they have done throughout the appellate proceedings that have now brought them to this Court, to have appropriate contribution rules recognized to mitigate the potential consequences of that risk.

B. Movants Have Mischaracterized the Issue and Petitioners' Argument in this Case

In addition to movants' mischaracterizations of the record as set forth above, they also have sought improperly

[8] *See* Georgia-Pacific Br. at 1 & n.1; PCA Br. at 3-4. Petitioners' settlements are expressly conditioned upon obtaining final court approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, entry of judgments approving the settlements and final disposition of any appeals that may be taken from such judgments. "Preliminary approval" of these settlements by the District Court was merely a determination that the settlements are appropriate for submission to the class by notice and hearing as required by the express terms of the agreements and Rule 23(e). *See Manual for Complex Litigation* § 1.46, at 53-55 (West ed. 1977). In fact, in recognition that petitioners' settlements have not yet been finally approved, the District Court granted a severance of the class action plaintiffs' claims against Georgia-Pacific, PCA and several other defendants whose settlements have not been finally approved and stayed a trial of those claims pending final resolution of these settlements. Pretrial Order No. 52, ¶ 3 (May 28, 1980). Moreover, as movants well know, even "final approval" and entry of judgment does not necessarily ensure ultimate effectuation of class action settlements, in light of the possibility that appeals may be taken by class members or parties from the judgments approving the settlements, just as has been done in the case of all of the M.D.L. 310 class action settlements that already have been finally approved by the District Court. *Indeed, several settling defendants (including eleven of the defendants who have moved to dismiss this proceeding) have appealed from the judgments entered on their own settlements raising questions concerning possible rights of rescission.*

to narrow the issue before this Court and to describe petitioners' position on that issue in a way that, although it fits neatly into movants' dismissal arguments, misstates petitioners' argument in this Court and in the Courts below. Movants thus repeatedly espouse *their* view that petitioners do not contend that there should be a right to assert contribution against settling defendants. This is not, and has never been, petitioners' argument.

From the outset of petitioners' efforts to assert contribution rights in M.D.L. 310, petitioners have advocated implementation of those rights by cross-claim and affirmative defense based upon a rule of contribution against all co-conspirators,[9] with an integral part of that rule being a claim reduction component with reference to those co-conspirators who settle with the claimants. It has been, and continues to be, petitioners' contention that fairness and justice to all parties require the adoption of a contribution rule with claim reduction as a vital part of that rule. Such a rule of contribution would result in a fair and proportionate reduction of the plaintiff's claim to reflect that part of that claim that was sold in settlement. As petitioners consistently have stated, this rule is the proper manner in which to effectuate contribution rights and results in the fair apportionment of damages that is the heart of the contribution principle.[10] Movants' attempt to recast the relief sought by

[9]Georgia-Pacific's express reservation of rights in its motion to assert contribution claims against nonsettling defendants and others made clear its intention to pursue such claims against all who could be held liable on those claims.

[10]*See, e.g.*, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir.), Brief for Appellants at 12-19, 26-27. In its opening brief in this Court, Georgia-Pacific not only endorsed the arguments made in Westvaco's brief in support of contribution rights generally (Georgia-Pacific Br. at 4), but also set forth additional reasons why it believes recognition of contribution rights by this Court is essential for the proper private enforcement of the antitrust laws (*id.* at 5-21). *See also* PCA Br. at 4-5. In this regard, there is no basis for movants' suggestion that, as a result of Westvaco's settlement, its brief filed with this Court is to be withdrawn.

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petitioners as a rule of claim reduction *instead* of contribution (Motion at 8), therefore, is far wide of the mark. Petitioners have not advocated claim reduction in these appellate proceedings as an abstract proposition, separate and distinct from contribution; rather, petitioners consistently have argued that claim reduction should be part of the complete rule of contribution that, as other courts have recognized, not only furthers the essential premise of fairness that underlies contribution but also, equally important, removes the potential conflict between a less than complete contribution rule and the public policy of fostering settlement of litigation.[11] Thus, the very premise of claim reduction, as it has been argued by petitioners in this Court and in the Courts below and as it has been applied by courts adopting that rule, is that contribution rights of non-settling defendants *are* recognized against *all* joint wrongdoers but that, in order to achieve settlement finality, contribution claims against settling defendants are satisfied by claim reduction.

Movants argue that "the issue of claim reduction is not before this Court" (Motion at 5, 8) based on nothing more than their own self-serving conclusion that the District Court and Court of Appeals correctly severed that "issue" from the question whether contribution is available to antitrust defendants and because of the District Court's failure to enter a Rule 54(b) final judgment on the claim-reduction "issue." As already noted, however, petitioners consistently have advocated claim reduction in these proceedings as an integral part of contribution rights in this litigation.[12] Hence,

See Motion at 3, 4. Nothing in Westvaco's settlement agreement requires withdrawal of its brief (*see* Westvaco Motion at 2), and such withdrawal would be inappropriate because of other parties' incorporation of that brief into their own briefs.

[11] *See* Georgia-Pacific Br. at 22-26; PCA Br. at 5-8; Westvaco Br. at 35-38.

[12] Claim reduction, standing alone, would be appropriate in this litigation as a rule of fundamental fairness even if contribution rights, including

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Georgia-Pacific and PCA respectfully submit—as they have throughout these proceedings—that the partial settlements that have been and may be reached in this litigation do not provide a reason for rejecting the application of contribution

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claim reduction as an integral part, were not recognized in antitrust litigation. Petitioners, as well as other defendants, have urged, in the alternative to a complete contribution rule, that the District Court adopt such a rule. Nevertheless, Georgia-Pacific and PCA submit that the District Court and Court of Appeals erred in attempting to bifurcate the contribution issue, which reflects those Courts' apparent failure to appreciate the premise for application of claim reduction as an integral part of a contribution rule. Although they now seek to capitalize on such a severance of the contribution issue in their effort to avoid a decision by this Court on that issue, the respondents themselves recognized claim reduction as part of the contribution issue in the District Court. *See* Plaintiffs' Memorandum in Opposition to Westvaco Corporation's Memorandum in Support of Certain Modifications to the Proposed Settlement Agreements (filed, May 11, 1979), in which plaintiffs argued, in opposition to Westvaco's request to condition approval of the then-pending settlements on claim reduction, that Westvaco thus sought "to achieve some sort of contribution right, if not against Settling Defendants then against Plaintiffs . . . ." *Id.* at 1 (R. 383). *See also id.* at 10 (R. 392) (Westvaco seeks "contribution from plaintiffs on account of a partial settlement"); at 11 (R. 393) (claim reduction described as a "*res nova* contribution issue"); at 13 (R. 395) (reference to the "contribution rule" (*i.e.*, claim reduction) adopted by the court in *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (*see* Georgia-Pacific Br. at 23-24)).

Moreover, unlike their apparent approach in the motion to dismiss filed in this Court, none of the defendant-respondents has opposed, and indeed most have supported, claim reduction in some form in the proceedings in the Courts below. *See* Georgia-Pacific Br. at 9 n.14; J.A. 112-17. For instance, several defendant-respondents, including four of the movants, expressly requested the District Court to decide "the contribution issue . . . in a way that will protect the rights of settling defendants to the greatest extent possible." They continued:

> In *Professional Beauty Supply, Inc.*, the Eighth Circuit stated that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants." To protect settling defendants in the instant cases, these defendants respectfully submit that the Court should rule—in addition to holding that contribution is not presently permitted among co-conspirators in antitrust cases in the Fifth Circuit—that . . . the effect of the settlements in these cases is the removal from Plaintiffs' damage claims against non-settling defendants of the sales made by settling defendants over the period of the alleged conspiracy or a pro rata reduction

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rights; to the contrary, those rights can and should be accorded to defendants in all circumstances, including instances of partial settlement, to avoid the undue unfairness and injustice brought about by a contrary rule. Respondents have vigorously opposed contribution, either in whole or in part, in the proceedings in both Courts below, and there is no reason to believe they do not continue to do so now. Movants' mischaracterization of the record and their feigned "agreement" with petitioners should not lead the Court to the erroneous conclusion that the contribution issue has evaporated from M.D.L. 310.[13]

II. The Case Before the Court Is Not Moot

The contribution issue is not moot in M.D.L. 310. Simply put, movants' general statement that "[i]t has been long recognized that settlement generally renders a case moot" (Motion at 7) disregards the status of this case and the clearly divergent positions of petitioners and respondents on the contribution issue.

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of their claims based on the number of settlers. If Westvaco cannot be held liable for the sales of settling defendants then its action for contribution is moot. Such a holding would protect the integrity of the settlements and would clearly meet the fairness principle espoused in *Professional Beauty Supply, Inc.*

Brief of Certain Settling Defendants in Opposition to Motion of Westvaco to Amend Its Answer to Assert Cross-Action for Contribution at 3-4 (dated April 3, 1979) (R. 281-82). Furthermore, even assuming *arguendo* that claim reduction could be considered to be an issue separate from contribution, claim reduction nevertheless was properly before the Court of Appeals because it is so inextricably related to the broader contribution issue. *See, e.g.*, In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1096 (5th Cir. 1977); Fox v. City of West Palm Beach, 383 F.2d 189, 194 (5th Cir. 1967); Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 826 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964). Moreover, claim reduction is now before this Court because, as this Court's rules provide, the statement of issues presented to the Court "comprise[s] every subsidiary question fairly included therein." Supreme Court of the United States Rule 21.1.

[13]As certain of those who have sought leave to file a brief in this proceeding as *amici curiae* aptly observed, movants' argument that claim

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Cases involving separable or collateral controversies that remain unresolved despite a settlement are not rendered moot by the settlement. *See Bank of Marin v. England*, 385 U.S. 99 (1966). *See also Ritzau v. Warm Springs West*, 589 F.2d 1370 (9th Cir. 1979); *Church of Scientology v. United States*, 485 F.2d 313 (9th Cir. 1973).[14] As the Court stated in *Powell v. McCormack*, 395 U.S. 486 (1969): "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. But, "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 497. As in such cases, petitioners' tentative class action settlements in M.D.L. 310 do not render the issue now before the Court moot. As set forth above, the contribution issue remains fully alive in the opt-out cases; Georgia-Pacific and PCA unquestionably have a legally cognizable, economic stake in the resolution of that issue in those cases. Stated another way, the Court still can grant appropriate relief by allowing assertion of contribution rights by cross-claim and claim reduction in those cases, so that the issue clearly is not moot.[15]

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reduction is not before this Court "would have the Court evaluate a truncated rule of contribution, stripped of its claim reduction component—one which could readily be attacked for its adverse effect on settlements. But no one advocates such a rule for antitrust cases...." Brief of Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz as Amici Curiae at 15-16 (dated August 14, 1980).

[14]This principle is one of general application in cases where the mootness issue arises from events other than settlement. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Liner v. Jafco, Inc., 375 U.S. 301 (1964); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

[15]Cases may become moot when the kind of relief requested is very limited and where subsequent events effectively deprive the Court of its power to act (*see, e.g.*, Brockington v. Rhodes, 396 U.S. 41 (1969); Alejandrino v. Quezon, 271 U.S. 528 (1926)), or where a decision by the Court will have no effect on the outcome of the controversy (*see, e.g.*, DeFunis v. (continued)

Moreover, cases are not moot where they involve a continuing, underlying controversy or the possible recurrence of such an underlying controversy even though the controversy or its consequences temporarily may have ceased. *See, e.g., Division 1287, Amalgamated Ass'n of Street Ry. Employees v. Missouri*, 374 U.S. 74 (1963); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Local 74, United Brotherhood of Carpenters v. N.L.R.B.*, 341 U.S. 707 (1951).[16] The rationale for concluding that such cases are not

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Odegaard, 416 U.S. 312 (1974)). In this case, however, the Court can grant relief that will affect the outcome of the controversy because any decision by the Court will affect Georgia-Pacific's and PCA's interests in the pending opt-out cases and, possibly, in the M.D.L. 310 class actions as well. In this regard, movants' citation of *Alejandrino v. Quezon*, 271 U.S. 528 (1926) (*see* Motion at 9-10 n.9), is misleading. The Court rejected essentially the same kind of reliance upon that case in *Powell v. McCormack*. In *Powell*, the Court recognized the limited significance of *Alejandrino*, pointing out that "the reason for the dismissal in *Alejandrino* was not that Alejandrino's deprivation of salary was insufficiently substantial to prevent the case from becoming moot, but rather that his failure to plead sufficient facts to establish his mandamus claim made it impossible for any court to resolve the mandamus request." 395 U.S. at 498. As this Court stated in *Powell*, "*Alejandrino* stands only for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Id.* at 499. Here, however, issue clearly has been joined on the question of the availability of contribution rights in the opt-out cases and that issue thus has not become moot in M.D.L. 310. Georgia-Pacific and PCA certainly have a greater "personal stake" in the resolution of the issue now pending before the Court than did the petitioners in another case, not found to be moot, where the petitioners were concerned only with "some unspecified future litigation" in which their interests might be affected. Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939); *see* Deposit Guar. Nat'l Bank v. Roper, 48 U.S.L.W. 4279 (1980).

[16]Movants' suggestion that this case may be moot because the contribution issue is not one necessarily capable of "evading review" (Motion at 8 n.8) is immaterial. Where there is a "recurring controversy," the Court has not always found it necessary to address the question whether the issue raised is one that may evade review in determining if it remains a "live" issue before the Court. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* United States v. W.T. Grant Co., 345 U.S. 629 (1953).

moot is that the underlying issue remains unresolved and that, because of this lack of resolution and the continuing nature of the underlying controversy, the same issue will likely recur in the future for a party to the case. 341 U.S. at 715. Similarly, the underlying controversy over recognition of contribution rights remains unresolved in M.D.L. 310. In fact, the issue whether antitrust defendants may assert rights of contribution already has recurred in the opt-out cases in M.D.L. 310.

The concern for not sanctioning avoidance of appellate review of important issues is clearly present in this case. Thus, the Court should not allow antitrust plaintiffs to coerce defendants, fearing potentially enormous damages, into settlements, thereby avoiding full appellate review of the issue of contribution, the denial of which was the very force that enabled coercion of settlements in the first place. Westvaco's recent settlement, which triggered the motion to dismiss the writ, underscores the importance of this principle in this case. *See* Westvaco Motion at 1 ("Although Westvaco was confident of its innocence, it felt compelled to settle in the absence of an established right of contribution because plaintiffs sought from Westvaco billions of dollars of damages attributable to sales by over thirty defendants who had previously settled. As a *sine qua non* of the settlement, plaintiffs insisted that Westvaco agree to seek the dismissal of its appeal in this Court . . . .") *See also* Georgia-Pacific Br. at 7.[17]

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[17]*See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot . . . . A controversy may remain to be settled in such circumstances . . . .") (citation omitted). A dismissal for mootness leaves the party whose conduct is challenged free to commence again the contested activity. Gray v. Sanders, 372 U.S. 368, 376 (1963) ("'The voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . .

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Additionally, as this Court expressly recognized in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), settlements that remain tentative because of contingencies such as required court approval, as petitioners' settlements in this case, do not render appeals in those cases moot. *Id.* at 465 n.3. Accordingly, petitioners' potential contribution claims remain as live controversies in the M.D.L. 310 class actions until petitioners' settlements become final.[18]

[their] old ways.'") Denial of dismissal for mootness, on the other hand, ensures that appellate review of important, controversial issues is not precluded by the voluntary activity of the party wishing to avoid appellate review. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309 (1897) ("If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken.")

[18]Contrary to movants' contentions, the facts relating to the mootness question in *Coopers & Lybrand v. Livesay* were not materially different from those in this case. After a class action settlement agreement was reached in *Coopers & Lybrand*, all of the petitioners except Coopers & Lybrand agreed to dismiss the proceeding in this Court. Coopers & Lybrand, however, continued to press the issue raised in its petition and the Court did not find the issue to be moot in light of the tentative nature of the settlement, which had not yet been approved by the District Court. 437 U.S. at 465 n.3. Just as the parties in *Coopers & Lybrand* continued to have "sharply divergent positions on the question before the Court" (Motion at 9), the question of whether defendants in antitrust cases may assert rights of contribution has been hotly contested throughout the course of this litigation and continues to be contested. The fact that the settlement agreement in *Coopers & Lybrand* may not have been reached until the case had been fully briefed and argued in the Supreme Court is irrelevant, because the question of mootness, as a potential limitation on the Court's jurisdiction, can be raised and determined at any point in the litigation. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 (1978); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7-8 (1978). *See also* R. Stern & E. Gressman, *Supreme Court Practice* 885-86 (5th ed. 1978). Thus, the Court could have found *Coopers & Lybrand* to be moot, even after oral argument, had such a finding been warranted.

Each of the foregoing reasons demonstrates that the matter before the Court in this proceeding is not moot. There still remains a hotly contested issue, the resolution of which by this Court will substantially affect Georgia-Pacific's and PCA's stake in the outcome of the litigation. The requisite "case or controversy" clearly exists in order for this Court to have jurisdiction to exercise its judicial power. The Court should not dismiss the case now before it and thereby require relitigation of the same contribution issue in duplicative appellate proceedings.[19] Accordingly, the motion to dismiss should be denied.

III. The Writ Should Not Be Dismissed as Improvidently Granted

Petitioners sought review by this Court of the Court of Appeals' decision on two grounds: *first, that there is a conflict among the circuits on the question whether antitrust defendants may assert contribution rights and, second, that resolution of the contribution issue by this Court is appropriate because of the importance of that issue to the just enforcement of the federal antitrust laws. See* Petition at 6-14. Movants have not even suggested that either of these grounds somehow has disappeared since the filing of the petition or the granting of the writ.[20] In fact, the conflict among the circuits still exists and the contribution issue remains one of the most debated and widely discussed issues under the antitrust laws.

In apparent recognition of the obvious frailty of their mootness argument, movants have made the same argument

[19]Avoidance of such wasted effort and resources is a relevant consideration when mootness issues are raised. *See* Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("We would, therefore, strain the concepts of mootness if we required petitioner to start all over again....").

[20]*See, e.g.*, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) (writ of certiorari dismissed as improvidently granted where it appeared after oral argument that circuits were not in conflict).

in another guise by contending that, even if the case is not moot, the changed circumstances since filing the petition for a writ of certiorari nonetheless somehow indicate that the writ was improvidently granted. As in their mootness argument, however, movants do not confront the matters that are truly material to the issue raised by their request that the Court dismiss the writ in this case, undoubtedly because to do so compels the conclusion not that the writ should be dismissed but that this Court's review of the contribution issue in this case is now more appropriate than ever. Neither the parties' status nor the record in M.D.L. 310 has changed in such a way as to make it inappropriate for the Court to resolve this important issue in this case.

This case is not one, for example, where full examination of the record reveals that the question presented in the petition for writ of certiorari was not raised on the record below,[21] or where the question presented raises disputed questions of fact.[22] On the contrary, the issue of whether defendants in antitrust cases may assert rights of contribution has been fully presented and vigorously argued at every stage of this proceeding. Petitioners' tentative class action settlements result merely in probable elimination of some, but not all, potential contribution claims in this litigation; the question of petitioners' rights to pursue contribution claims has been raised and remains unresolved in the opt-out cases and the parties clearly diverge in their positions on how to resolve that issue.

Contrary to movants' suggestion, moreover, this case is not one in which circumstances have so changed that the issue upon which the writ of certiorari was granted no longer is presented by the record or is no longer of importance to

[21] *See, e.g.*, Bostic v. United States, 402 U.S. 547 (1971); Palmieri v. Florida, 393 U.S. 218 (1968); Smith v. Butler, 366 U.S. 161 (1961).

[22] *See, e.g.*, Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924); Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918).

the parties. The cases cited by movants are inapposite.[23] For instance, the dismissal of the writ in *Piccirillo v. New York*, 400 U.S. 548 (1971), was based on the fact that an intervening decision by the New York Court of Appeals made a decision on the fundamental constitutional question on which certiorari was granted unnecessary for a resolution of the case. Movants rely on no such change or clarification in the law or any similar change in circumstances as a reason for dismissal of the writ in this case.[24] As set forth above (*see* pp. 3-9

[23]*McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971), and *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960), were both dismissed with short, per curiam opinions that did not set forth the reasons for dismissal.

[24]Other cases cited by movants likewise do not support their motion. In *Sanks v. Georgia*, 401 U.S. 144 (1971), not only did the tenants voluntarily abandon possession of the leased premises, but the state statutory scheme under constitutional attack in that case was repealed virtually in its entirety. *Id.* at 147. The tenants argued that the case was still alive because of the possibility of a judgment against them on remand for double damages under the repealed statute. The Court pointed out the remoteness of such an occurrence and the impossibility of predicting whether its decision on the issues raised in the case before it would have any bearing on possible future litigation. *Id.* at 149-50. The decision to dismiss the writ thus was based on the difficulty of predicting whether the issues presented would ever be material in further litigation, a problem involving "purely matters of state law." *Id.* at 150.

In *Jones v. State Board of Education*, 397 U.S. 31 (1970), a student was suspended indefinitely from a state university. The Court granted certiorari to consider the issues raised by the student's claim that he had been suspended solely because he had distributed leaflets urging a boycott of fall registration. The writ was dismissed because of the conclusion, after oral argument and a closer review of the record, that the student's suspension was based in part on the finding that he lied at the hearing on the charges against him. This fact clouded the record sufficiently so as to render the case an "inappropriate vehicle" for the Court's first decision on the extent of the First Amendment restrictions upon universities' powers to suspend students. *Id.* at 32.

United States v. Fruehauf, 365 U.S. 146 (1961), involved a direct appeal to this Court from a district court under the Criminal Appeals Act, the sole question before the Court being " 'whether a loan of money comes within the . . . prohibitions' of § 302 of the Labor Management Relations

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supra), the contribution issue clearly is raised by the current record in M.D.L. 310 and that issue remains of great importance to the parties.

Moreover, it cannot seriously be suggested that subsequent events have so changed the circumstances of this case that the question presented on certiorari no longer has public significance.[25] Certiorari jurisdiction was conferred upon the Court "to decide issues, 'the settlement of which is of importance to the public as distinguished from...the parties.'" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 479 (Harlan, J., dissenting). "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). The tentative settlements in this case in no way diminish the public interest in and the far-reaching significance of the issue of contribution among antitrust defendants.

Act, 1947." *Id.* at 154. After a closer review of the record, it appeared that the Government could have pursued any one of a number of theories at trial, but that the district court's dismissal of the indictments, on the basis of a pretrial memorandum, did not clearly indicate which of the theories were foreclosed. The Court declined to decide the question presented on appeal because of the cloudy state of the record and the abstract nature of the question.

[25] *See* Triangle Improvement Council v. Ritchie, 402 U.S. 497, 499 (1971) (Harlan, J., concurring in dismissal of writ as improvidently granted) ("The fact that the statute [upon which petitioners' contentions were based] has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case, I think, a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import.") *See also* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 76-77 (1955).

Finally, the only truly material developments in this litigation since filing of the petition further reinforce the compelling need for resolution of the contribution issue by this Court in this case. On September 13, 1980, after a three-and-one-half-month class action jury trial in M.D.L. 310, the jury returned a verdict finding that Mead, the only defendant that went through a trial rather than settle with the class action plaintiffs, had participated in the alleged price-fixing conspiracy. Plaintiffs' counsel have estimated that, once judgment is entered on this verdict, Mead potentially could be liable for industry-wide damages of close to one billion dollars (after trebling) for the two-and-three-quarter-year damage period for which the jury found Mead liable. Such staggering potential liability—which could result from a denial of contribution rights to Mead, a company that was acquitted of criminal charges based on essentially the same price-fixing allegations and that accounts for less than three percent of industry sales—stands as clear proof of the manifest injustice of a denial of contribution rights.

Moreover, as already noted, the jury found in its verdict that Georgia-Pacific had not participated in the alleged conspiracy. In light of this finding, Georgia-Pacific's exorbitant settlement, paid by a company that was forced by the denial of contribution rights to sacrifice the right to prove its innocence at trial, demonstrates again the inherent unfairness of such a rule.[26] As these developments make clear, the injustices wrought by the denial of contribution rights continue to plague this litigation.

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[26]Westvaco's recent settlement for almost one million dollars similarly evidences the inordinate payments that antitrust plaintiffs, aided by a denial of contribution rights to defendants, can extract from a defendant whom, in the words of the judge who presided over the case against it, "the plaintiffs made a mistake of ever bringing . . . into the case." *See* Westvaco Motion at 2.

This case now presents the Court with perhaps the best possible record on which to resolve the contribution issue, which can be addressed in the complete context of a major antitrust litigation involving class actions, numerous opt-out cases, several settlements[27] and a potential billion-dollar judgment against one of many alleged co-conspirators, and to fashion the appropriate contribution rule in such circumstances. Consequently, all of the factual considerations pertinent to this Court's determination of a rule of contribution applicable in the full spectrum of civil antitrust litigation are presented in this case. The Court's consideration of the contribution issue in this case remains entirely appropriate, and, accordingly, the writ should not be dismissed.

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[27]As the courts frequently have observed, recognition of contribution rights necessarily requires accommodation of those rights to the principle that compromise of litigation should be fostered, and this balancing process requires the courts to "fashion a rule of contribution which will protect the rights of settling defendants . . . ." Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979); *see* Georgia-Pacific Br. at 22-26. This case provides an ideal vehicle for adoption of such a complete contribution rule.

CONCLUSION

For all of the foregoing reasons, the Motion of Certain Respondents to Dismiss the Writ of Certiorari should be denied.

Respectfully submitted,

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